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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 347

AMERICAN LIFE AND ACCIDENT,
INSURANCE COMPANY OF KENTUCKY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on May 10, 1968.

OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board is reported at 158 NLRB 258. The Court of Appeals entered its Order without a written opinion in its Case No. 17,805, and at the time of printing hereof said Order has not been reported.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on May 10, 1968, and a copy thereof is appended to this Petition in the Appendix at pages 12-13. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 29 U. S. C. 160(e).

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board's Decision and Direction of Election holding that a combination of two of Petitioner's district sales offices constituted a unit appropriate for collective bargaining was controlled by the extent of the Union's organization of employees.

2. Whether the National Labor Relations Board's refusal to allow the Petitioner to present evidence at an unfair labor practice hearing regarding the Regional Director's bias and prejudice in finding an appropriate unit was a denial of due process of law and a denial of Petitioner's statutory right to hearing as guaranteed by Section 10(b) of the National Labor Relations Act.

STATUTES INVOLVED.

The pertinent portions of 61 Stat 144, 29 U. S. C. Section 159(c)(5), Section 9 (c)(5) of the National Labor Relations Act and 61 Stat 136, 29 U. S. C. Section 160(b), Section 10(b) of the National Labor Relations Act are set forth in the Appendix at page 12.

STATEMENT.

Petitioner employs debit agents who sell industrial life insurance out of 15 district offices located in Ohio and Kentucky. The Insurance Workers Union petitioned for an election among employees at Petitioner's 2 district offices in Cleveland. The evidence adduced at the representation hearing shows that the American Life & Accident Insurance Co. of Kentucky has from its inception been a small, closely-held family enterprise with all decision-making powers centered in the home office in Louisville, Kentucky. It has only fifteen offices located in Kentucky and Ohio. Dinwiddie Lampton, Jr., the only witness in the representation proceedings, is Petitioner's Vice President and principal administrative officer. He has more than thirty years' service and his father, the founder and president of the company, has more than sixty years' service (JA 45a). There are no other officers of the company and no employees comparable in service, experience, or power with regard to the company's affairs (JA 45a-46a). While the company's growth has necessitated some structural changes including the establishment of district offices, this has in no sense upset the centralization of power or the traditional means of doing business.

Crucial employment functions are handled solely by Mr. Lampton. For example, all applications for employment as debit agents are made on a standard form supplied by the home office (JA 52a-53a). The applications are sent into the home office to Mr. Lampton who initiates the necessary investigation of references and credits (JA 53a). He alone then approves or disapproves the application and makes the decision as to when and if the new employee goes to work (JA 53a).

Once the debit agent is employed in any district office, Mr. Lampton personally and through his Louisville staff makes a weekly check of the performance of such agent as well as all debit agents (JA 55a-56a). Debit agents and supervisory personnel continue in close personal contact with the home office through the constant availability of Mr. Lampton by telephone and through travel (JA 64a). Further, the performance of the debit agent is evaluated through the use of a pool of 50 employees, all highly skilled salesmen who are denominated "special men" and who are assigned directly from and by the home office to any district office for the purpose of assisting debit agents in solicitation of new business and collection of premiums (JA 58a). The home office's ability to maintain a constant analysis of each debit agent's performance and its corresponding ability to efficiently assign its special men is augmented by a female employee who compiles special information in the home office on selected agents (JA 56a). The procedure of general supervision from the home office is further aided by the use of an IBM computer (JA 105a).

Corporate financial affairs also reflect the centralized nature of Respondent's operations. All of Petitioner's books, accounts, and payrolls are opened and closed on the same day of the week throughout all the districts (JA 81a). While the debit agents turn in collections to the district office cashier, no books are kept at the district office, but rather all books and records are kept and posted in the home office (JA 75a). While it is traditional, both within the industry and the company, to pay debit agents on a commission basis, reasons for deviating from that rule, especially in the instance of older salesmen, may intervene and occasion a departure from the norm. In the event a decision is made to place a debit agent on salary, such decision is made exclusively in the home office (JA 80a).

When debit agents are paid, checks are drawn in the home office and signed by Mr. Lampton (JA 87a). The decision to pay or not to pay a debit agent on a voucher is made by Mr. Lampton (JA 56a). Decisions on the handling of claims are also made in the home office (JA 59a).

All elements of wages, hours and working conditions further reflect the centralized pattern set forth above. If an individual debit agent wants a change in the size or geographical limits of his business, Mr. Lampton makes the decision thereon (JA 84a). Vacation program are uniform throughout the company and Mr. Lampton alone authorizes the vacations (JA 101a). This decision further reflects the fact that he is the only person in the organization in a position to determine whether and when a man is available to fill the vacated slot (JA 100a-101a). Similarly, sick leave and sick pay benefits are company-wide and the debit of an agent on sick leave is serviced by an overhead man assigned by the home office (JA 91a-92a). Employee benefits are themselves uniform throughout the system.

Geographical considerations required the establishment of district offices. Otherwise, actual contact with policyholders and potential customers would be greatly reduced. Accordingly, eight district offices have been established in Kentucky and seven in Ohio, each district office being under the general direction of a district manager who, in turn, is directly responsible to the home office in Louisville (JA 46a). There are no intermediate levels between the district manager and the home office. Each of the managers has been an agent with the company and none have been hired from outside (JA 48a). All supervisory personnel are salesmen primarily and assist the debit agents in their selling functions (JA 46a-49a). In the Cleveland area, the largest city in which a district

office was established, growth necessitated the creation of a second Cleveland office in order to make administration more efficient (JA 50a-51a). Debit agents were thus able to stay closer to their territories and were able to cut down on their driving time (JA 51a). The branch offices do not correspond with the city limits of Cleveland, but extend beyond them as far as Elyria on the west and Alliance to the east (JA 94a). This is in keeping with Petitioner's general pattern of doing business, for there is as much business beyond the city boundaries as there is within them (JA 69a).

Termination of employment for any reason is only with the approval of Mr. Lampton, although generally he supports the judgment of his district manager (JA 54a-55a). Thus, from beginning to end of a debit agent's service, from the hiring to the firing, the close control of the home office is readily apparent.

Despite the above, the Regional Director erroneously found that "each district office is a complete, self-contained operating unit"; "that each office is in a large measure autonomous in its daily operations" and "the individual district office is in effect a separate administrative entity through which the employer conducts its business operations." He further found "that there is a substantial distance between the district offices involved here and the home office" despite the evidence of continual phone contact and personal visits. He concluded his finding by stating:

> "Therefore as the petitioner is seeking a unit comprising all of the employer's district offices in a separate and distinct geographic area in the city of Cleveland, Ohio, there is no history of collective bargaining and no union seeks a broader unit, I find such a unit

appropriate for purposes of collective bargaining." (JA 17a-20a.)

The Regional Director made his decision that the unit was appropriate without reading or considering Petitioner's Brief setting forth reasons why the unit was not appropriate for collective bargaining. The Petitioner subsequently refused to bargain with the Insurance Workers Union and the National Labor Relations Board issued its Complaint charging the Petitioner with violations of Sections 8(a)(1) and (5) of the National Labor Relations Act. The Petitioner filed an Answer admitting that it had refused to bargain with the Union and explained that said refusal was based upon the Regional Director's unlawful certification of the bargaining unit. The General Counsel of the National Labor Relations Board filed a Motion for a Summary Judgment on the pleadings and, in response to two orders to the Trial Examiner to show cause why the Motion for Summary Judgment should not be granted, the Petitioner expanded upon its Answer to the Complaint and stated that it intended upon the hearing on the Complaint to present evidence of the Regional Director's bias and prejudice in determining the unit to be appropriate without regard to the evidence presented at the representation hearing. Judgment against the Petitioner was granted on the pleadings by the Trial Examiner. The Petitioner excepted to the National Labor Relations Board and requested oral argument before the Board. The Board sustained the Trial Examiner and denied the Petitioner's request for oral argument. The Court of Appeals for the Sixth Circuit ordered enforcement of the Board's Orders.

REASONS FOR GRANTING THE WRIT.

The Board's Order in this case was made after the Supreme Court's judgment in *NLRB vs. Metropolitan Life Insurance Co.*, 380 U. S. 438. The Board's Decision in this case, which was written by its Regional Director, "articulates" reasons which purport to be factors supporting the determination that the combination of two district offices constitutes an appropriate bargaining unit. The Regional Director's reasoning recognizes only small portions of the evidence, and in some instances the evidence recognized is distorted from the record, in order to rationalize and reach the ultimate conclusion that each district office constitutes an independent administrative entity. However, when all the evidence is considered in context no reasonable mind could conclude that each district office was an independent administrative entity, but rather the only conclusion that can be rationally drawn is that the Petitioner's entire operations constitute a single administrative entity and the district offices are simply geographical extensions of Petitioner's principal office in Louisville, Kentucky.

Obviously the Board, in adopting the Regional Director's reasoning in this case after the Supreme Court had written its opinion in *NLRB vs. Metropolitan Life Insurance Company, supra,* has interpreted the *Metropolitan* opinion to mean that the Courts will not examine the record to determine whether the Board has exceeded the limitation imposed upon it by Congress in Section 9(c)(5) of the Act, that is, that the Board shall not find a bargaining unit appropriate where the extent of employee organization is the controlling factor. The Board interprets the *Metropolitan* opinion to mean that so long as it articulates any reason in addition to the extent of organization its findings will not be disturbed by the Courts regardless

of the fact that said articulated reasons may not be supported by evidence. The Supreme Court should grant certiorari herein to clearly require the Board to rely on reasons, in addition to extent of organization, which reasons are supported by evidence and not merely legal fictions to avert the intent of Congress.

Counsel for the Petitioner respectfully submits that an examination of the proceedings of the representation hearing will unequivocally demonstrate that the articulated conclusion that each of Petitioner's district offices constitutes an independent administrative entity is absolutely refuted by the evidence.

A further examination of the proceedings will demonstrate that the Board and its Regional Director had engaged in a policy to grant elections among insurance agents in any bargaining unit as petitioned, and that this policy was effectuated in this case without regard to the limitations of Section 9(c)(5) of the Act and Petitioner's procedural rights. The Regional Director made his determination that the unit was appropriate without reading Petitioner's Brief regarding the inappropriateness of the bargaining unit. In the subsequent unfair labor practice proceedings the Petitioner was denied a hearing and the opportunity to present evidence of the Regional Director's misconduct and existence of a policy disregarding the limitations imposed upon the Board by Section 9(c)(5) of the Act. In its pleadings and responses showing cause why it should have a hearing in the unfair labor practice proceedings, counsel for the Petitioner clearly stated that it did not wish to relitigate the issues considered in the representation hearing and counsel stated that it intended to present evidence of the Regional Director's misconduct, which evidence was of facts occurring after the representation hearing. Petitioner's right to a hearing on this

new matter was guaranteed by Congress in Section 10(b) of the Act wherein it is stated that: "* * * the persons so complained of shall have the right to * * * appear in person or otherwise to give testimony." The Supreme Court has previously held that a Respondent in an unfair labor practice proceeding is not entitled to a hearing where the Respondent intends only to relitigate issues that were fully litigated at a prior representation hearing. *Pittsburgh Plate Glass Co. vs. NLRB,* 313 U. S. 146. The Board has relied on this prior decision in denying the Petitioner a hearing in defense of the unfair labor practice charges because a prior representation hearing was involved; however, the Board has disregarded the fact that Respondent has sought to introduce evidence of the Regional Director's misconduct which obviously is new evidence and was not an issue at the prior representation hearing. While the Supreme Court's reasoning in the *Pittsburgh Plate Glass Co.* case is eminently clear, it should nevertheless review this case and correct the Board in its application of the case to the extent that it denies hearings where there is evidence not litigated in the prior representation case.

The flagrant disregard of the Regional Director and the Board of Petitioner's procedural rights demonstrate the arrogance of administrative power obtained through a vacuum created by lower courts that tend to accept the Board's decisions at face value. Counsel respectfully submits that if the Supreme Court is content to permit the Board to apply the *Metropolitan* opinion as though the Board is only required to articulate reasons without regard to supporting evidence, the Board will encroach upon Section 9(c)(5) of the Act, just as it has encroached upon the rationale of the Supreme Court's decision in the *Pittsburgh Plate Glass Co.* case, and will in fact find

appropriate bargaining units where the extent of employee organization is the controlling factor.

In both questions presented to the Supreme Court in this Petition for a Writ of Certiorari, the National Labor Relations Board has deliberately flaunted the authority of Congress and the decisions of the Supreme Court in applying both statutes and decisions as it desires rather than as intended by the Congress and the Supreme Court.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX.

PERTINENT PORTIONS OF STATUTES CITED.

61 Stat 144, 29 U. S. C. Section 159(c)(5), Section 9(c)(5) of the National Labor Relations Act:

"* * * In determining whether a unit is appropriate for the purposes specified in sub-section (b) of this Section the extent to which the employees have organized shall not be controlling."

61 Stat 136, 29 U. S. C. Section 160(b), Section 10(b), National Labor Relations Act:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a Complaint stating the charges in that respect * * *. The person so complained of shall have the right to file an Answer to the original or amended Complaint and to appear in person or otherwise and give testimony at the place and time fixed in the Complaint."

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 10, 1968.)

Before: CELEBREZZE and MCCREE, *Circuit Judges*, and MCALLISTER, *Senior Circuit Judge*.

The National Labor Relations Board petitions this Court for enforcement of its order against American Life and Accident Insurance Company of Kentucky, Respondent. The Board found in a Decision and Order reported at 158 NLRB—(No. 31) (1966) that the Respondent violated

Section 8(a)(5) and (1) of the Act, 29 U. S. C. § 158(a)(5) and (1), by refusing to bargain with the certified bargaining representative of a group of its employees. Respondent does not contest the fact of its refusal to bargain but contends that the unit covered by the certification was inappropriate, and therefore it was under no legal duty to bargain.

The power of this Court to set aside the Board's determination of an appropriate bargaining unit is a narrow one, limited to a determination of whether the Board has violated the proscriptions of Section 9(c)(5), 29 U. S. C. § 159(c)(5), by giving controlling weight to the extent of organization or has otherwise abused its discretion. *Metropolitan Life Insurance Company v. National Labor Relations Board,* 330 F. 2d 62 (6th Cir. 1964) *vacated and remanded on other grounds* 380 U. S. 525 (1965). In the instant case the Board found that a grouping of Respondent's Cleveland 1 and 2 offices, the only offices in the City of Cleveland, was an appropriate bargaining unit. In his decision the Trial Examiner articulated several bases for his ruling. See *National Labor Relations Board v. Metropolitan Life Insurance Co.,* 380 U. S. 438, 443 n. 6 (1965). We cannot say that the Board gave controlling weight to the extent of union organization or otherwise abused its discretion.

Respondent's contention that it was denied due process we find to be without substance. It is therefore ORDERED that the petition of the National Labor Relations Board to enforce its order be, and it is, hereby granted.

ENTERED BY ORDER OF THE COURT,
CARL W. REUSS,
Clerk.

FILED
JUL 29 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 347.

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY OF KENTUCKY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

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SUPPLEMENTAL APPENDIX.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

On December 10, 1964, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

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[1] The Respondent's request for oral argument is hereby denied, as the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

[2] The Respondent contends that the unit, including debit agents at the Respondent's Cleveland 1 and 2 district offices which serve the entire Cleveland, Ohio, area, found appropriate, is too limited in scope because these offices are not sufficiently autonomous and because the unit excludes the Akron, Ohio, and other offices, in Ohio and other States. In *Metropolitan Life Insurance Company (Woonsocket, R. I.)*, 156 NLRB 1408, the Board reviewed and reaffirmed its decision in *Metropolitan Life Insurance Company*, 138 NLRB 512, where on facts substantially similar to those in the instant case, the Board found appropriate a 6-office unit of debit agents covering the entire Cleveland area and specifically excluded the Akron and other offices. We find those decisions dispositive of the unit issue in the instant case, and therefore find the Respondent's contentions without merit.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, American Life and Accident Insurance Company of Kentucky, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated April 21, 1965, Washington, D. C.

FRANK W. MCCULLOCH, *Chairman,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
National Labor Relations Board.

(Seal)

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE PROCEEDINGS.

THE ANTECEDENT REPRESENTATION CASE.

After the usual proceedings under Section 9 of the Act in which the Respondent was represented by counsel and fully participated, the Regional Director, Eighth Region, National Labor Relations Board, at Cleveland, Ohio, issued a Decision and Direction of Election among the following employees whom he found constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All debit agents employed at or working out of the Employer's Cleveland 1 and Cleveland 2 district offices located in Cleveland, Ohio, excluding office clerical employees, special agents, district managers, assistant district managers, superintendents, assistant

superintendents, and professional employees, guards and all other supervisors as defined in the Act.

Pursuant to Section 102.67(b) and (c) of the Board's Rules and Regulations, Series 8, as amended, the Respondent thereafter filed a Request for Review of the Regional Director's Decision and Direction of Election with the Board in Washington, D. C. by Order dated April 15, 1964, the Board denied the Respondent's Request for Review on the grounds that it raised no substantial issue warranting review.

On April 28, 1964, the Regional Director, following a secret-ballot election conducted under his supervision, certified that a majority of the employees in the unit stated above had designated the Charging Party, hereinafter referred to as the Union, as their representative for the purposes of collective bargaining, and therefore was the exclusive collective bargaining representative of the employees in said bargaining unit.

THE INSTANT UNFAIR LABOR PRACTICE CASE.

Upon a charge filed by the Union on July 10, 1964, the said Regional Director issued a complaint on behalf of the General Counsel of the Board on August 7, 1964. As is more fully set forth in the Trial Examiner's opinion accompanying the Second Order to Show Cause, which is attached hereto as Appendix A, the complaint, after setting forth the usual jurisdictional allegations (paragraphs 1-5, inclusive), alleged: (1) that the employees in the above-stated unit constitute an appropriate collective-bargaining unit within the meaning of Section 9(b) of the Act (paragraph 6); (2) that on or about April 21, 1964, a majority of the employees in the unit described above in the secret-ballot election above referred to designated the Union as

their collective-bargaining representative, and that the Regional Director, on April 28, 1964, in Case No. 8-RC-5456 certified the Union as the exclusive collective-bargaining representative of the employees in the above-stated unit (paragraph 7); (3) that at all times since April 28, 1964, the Union has been the exclusive bargaining representative of all the employees in said unit, as provided in Section 9(a) of the Act (paragraph 8); (4) that commencing on or about May 11, 1964, and continuing to date, the Union has requested, and is requesting, the Respondent to bargain collectively with it as the exclusive representative of the employees in said unit (paragraph 9); and (5) that commencing on or about May 13, 1964, and at all times thereafter, the Respondent refused, and continues to refuse, to recognize or bargain collectively with the Union as exclusive collective-bargaining representative of all the employees in said unit (paragraph 10). Paragraphs 11-14, inclusive, of the complaint contain the usual conclusory allegations that the conduct described above constitutes unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act.

On August 25, 1964, the Respondent filed an answer to the complaint in which it admitted the jurisdictional allegations of the complaint and that the Union was a labor organization within the meaning of Section 2(5) of the Act. It denied the allegations of paragraphs 6 and 8 of the complaint regarding the appropriate bargaining unit the Union's status as exclusive representative of the employees therein.

With respect to the allegations of paragraph 7 of the complaint, the Respondent admitted that a majority of the employees in the unit alleged to be appropriate had cast their ballots for the Union in the Board-conducted election.

The Respondent answered paragraph 9 of the complaint dealing with the Union's request to it to bargain collectively by stating, among other things, "that said Union did on or about May 11, 1964, request the Respondent to bargain but that there has been no request to bargain since on or about May 11, 1964." Answering paragraph 10 of the complaint which alleged that the Respondent had refused and continues to refuse to recognize and bargain collectively with the Union, the Respondent stated "that it has never refused to bargain with said Union but that it has and does refuse to recognize said Union as the bargaining representative of any of Respondent's employees."

On September 9, 1964, the General Counsel filed a Motion for Judgment on the Pleadings requesting, in view of the admissions contained in the Respondent's answer, that the allegations of the complaint be found to be true and that the Trial Examiner make findings of fact and conclusions of law in conformity with the allegations of the complaint. Thereafter, counsel for the Union joined in General Counsel's Motion for Judgment on the Pleadings.

On September 23, 1964, the undersigned Trial Examiner having in the meantime been designated as the Trial Examiner to hear this case, issued an order directing the Respondent to show cause why the Notice of Hearing in this proceeding should not be vacated and the legal issues resolved by a written decision after the submission of briefs. The order further provided that if the Respondent believed that there were any issues of fact requiring resolution by a formal hearing, the Respondent should set forth in an offer of proof the relevant facts which it proposed to adduce. The Order to Show Cause is attached hereto as Appendix B.

In response to the Order to Show Cause the Respondent filed an amended answer in which it eliminated

the factual admissions regarding the Union's bargaining request and the Respondent's continuing refusal to recognize the Union and simply denied these allegations of the complaint. The text of the pertinent allegations of the complaint and the Respondent's amended answer is set forth at pp. 2-3 of the Trial Examiner's opinion accompanying Second Order to Show Cause which is attached hereto as Appendix A. The Respondent's amended answer did not contain any clarifying allegations of fact whatever.

Deeming the Respondent's amended answer not responsive to his Order to Show Cause and concluding that the Respondent's position required further clarification, the Trial Examiner on October 9, 1964, issued a Second Order to Show Cause and an accompanying opinion. The Second Order to Show Cause directed the Respondent to state whether in fact, as stated in its original answer and contrary to the allegations of the Respondent's amended answer,

(a) The Union, on or about May 11, 1964, did request the Respondent to bargain collectively; and

(b) The Respondent has and does refuse to recognize the Union as the bargaining representative of any of its employees.

The Second Order to Show Cause further directed the Respondent to state what, if any, issues it proposed to tender in this case than those already litigated in the representation proceeding, and to state the general nature of the facts which the Respondent proposed to adduce regarding such issues, and insofar as the Respondent intended to raise issues previously litigated in the representation case, state the general nature of the facts which the Respondent proposed to adduce and the basis for its position that such facts are admissible in evidence in this case.

On October 19, 1964, the Respondent filed an answer to the Trial Examiner's Second Order to Show Cause. In this answer the Respondent affirmed the truthfulness of the admissions in its original answer regarding the Union's May 11, 1964 request to bargain and its continuing refusal to recognize the Union as the bargaining representative of any of its employees. In its answer to the Second Order to Show Cause, the Respondent contended that these admissions were insufficient to establish a violation of Section 8(a)(5) of the Act and that it was necessary to take testimony regarding the refusal to bargain aspect of the violation. The Respondent also made various other contentions in this answer as to the invalidity of the appropriate unit determination herein involved. However, the Respondent did not offer to adduce any evidence other than as to matters already litigated in the representation case, or as to the matters which were properly litigable in the representation case. The Respondent made no proffer of previously unavailable evidence or of any evidence of events subsequent to the hearing in the representation case which might have been relevant in this case.

Upon consideration of the Respondent's answer to the Second Order to Show Cause and the pleadings as a whole the Trial Examiner concluded that most of the matters raised therein had been considered and disposed of by the Board when it denied the Respondent's Request for Review, that the alleged factual issue regarding the refusal to bargain was disposed of by the Respondent's admissions as to the Union's May 11, 1964, collective-bargaining request and as to its continuing refusal to recognize the Union as the bargaining representative of any of its employees, and that any other factual issues which the Respondent sought to raise were not properly litigable in this unfair labor practice case. Accordingly, the Trial Exami-

ner on October 26, 1964, issued an order vacating the Notice of Hearing herein and allowing the parties until November 16, 1964, within which to file briefs. This Order is attached hereto as Appendix C. The time for filing briefs was subsequently extended until Dcember 1, 1964, at the request of the Respondent.

The General Counsel and the Respondent have filed briefs which have been carefully considered.

In the Respondent's brief, it states the issues as follows:

I. Whether the Respondent has in fact refused to bargain with the charging party.

II. Whether the Respondent's combined district offices, Cleveland 1 and 2, constitute an appropriate bargaining unit.

III. Whether the Regional Director's Decision finding that the Respondent's district offices Cleveland 1 and 2 are an appropriate unit is a finding of an appropriate unit based solely upon extent of organization.

IV. Whether the Regional Director's Decision was based on bias and prejudice.

The record in the representation case, particularly the Respondent's Request for Review of the Regional Director's Decision and Direction of Election, shows that issues II, III, and IV were raised by the Respondent in the representation proceeding and decided by the Board when it denied the Respondent's Request for Review on April 15, 1964. As pointed out in the Trial Examiner's opinion accompanying his Second Order to Show Cause (Appendix A, p. 4), such issues may not be relitigated in the subsequent unfair labor practice case. The Trial Examiner is bound by the Board's determination with regard to such matters. On this point see also *Esquire, Inc.*, 109 F. 2d

530, 539, enforced, 222 F. 2d 253 (C. A. 7); *Mountain States Telephone & Telegraph Co.*, 136 NLRB 1612, 1615; *Brown Lumber Co.*, 143 NLRB 174, 175, 177.

With respect to issue I raised by the Respondent—in effect that the admissions contained in the Respondent's pleadings regarding the Union's May 11, 1964, request to bargain and its continuing refusal to recognize the Union as the representative of any of the employees are an insufficient basis for a finding of a refusal to bargain in violation of Section 8(a)(5) of the Act—the Trial Examiner has reconsidered the question but adheres to his previous opinion that such admissions do constitute an adequate basis for a finding of a refusal to bargain in violation of Section 8(a)(5) of the Act.

As indicated in the Trial Examiner's opinion accompanying the Second Order to Show Cause, the duty to bargain collectively embraces first of all the duty to recognize the representative chosen by a majority of the employees in an appropriate bargaining unit as the exclusive representative of all the employees in such a unit. *N. L. R. B. v. Hobbs Co.*, 132 F. 2d 249, 251 (C. A. 1) and cases therein cited; *N. L. R. B. v. Dallas Concrete Co.*, 212 F. 2d 98 (C. A. 5). It is admitted by the Respondent that on April 28, 1964, the Union was certified by the Regional Director as the exclusive bargaining representative of the employees in the Respondent's Cleveland 1 and Cleveland 2 district offices, with certain exceptions, and that on or about May 11, 1964, the Union requested the Respondent to bargain collectively with it. In view of this request the Respondent "was bound to make the next move." *Ritzwoller Co. v. N. L. R. B.*, 114 F. 2d 432, 436 (C. A. 7). Yet, as the Respondent admits, "the Respondent has and does refuse to recognize the Union as the bargaining

representative of any of its employees." Thus the Respondent admits that it continues to refuse to take the first step in fulfilling its collective-bargaining obligation under the Act. These admissions afford an adequate basis for a finding of a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act, and there is therefore no need for the taking of testimony on this issue.

While the Respondent takes a contrary position and asserts in its brief without any supporting argument, that the Trial Examiner's denial of a hearing on this issue denies it due process of law, in the view of the Examiner, as stated in his previous opinion, the Constitution does not require a hearing for the purpose of taking testimony where there are no factual issues to decide. In addition to the cases cited in the Trial Examiner's previous opinion (Appendix A, p. 7), see *Producers Livestock Marketing Assn. v. United States*, 241 F. 2d 192, 196 (C. A. 10), affirmed, 356 U. S. 282, and cases therein cited. In this case the court stated that "it is fundamental to the law that the submission of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided. * * * Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument."

Having concluded that the admissions in the Respondent's pleadings establish violations of Section 8(a)(5) and (1) of the Act by the Respondent, and that the Respondent has raised no other issues of fact which are properly triable in this unfair labor practice case, it is appropriate to grant counsel for the General Counsel's Motion for Judgment on the Pleadings, in which counsel for the Union has joined. *KVP Sutherland Paper Co.*, 143 NLRB 834, 836-837; *Metropolitan Life Insurance Co.*, 148 NLRB No. 145;

Equitable Life Insurance Co., 149 NLRB No. 42. Said Motion for Judgment on the Pleadings is hereby granted and, in accordance with the prayer of said Motion, the Trial Examiner hereby makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. The Respondent, a Kentucky corporation, having its principal office and place of business at Louisville, Kentucky, is engaged in the sale and issuance of industrial, life, health and accident insurance in several States of the United States, including the States of Kentucky, Ohio and Indiana. In the course of its business, the Respondent receives premiums in excess of $50,000 annually in Ohio, and in excess of $100,000 annually in Kentucky. The Respondent annually makes payment from its Louisville, Kentucky, office to policyholders outside the State of Kentucky in excess of $100,000 and annually pays claims to policyholders in the State of Kentucky in an amount in excess of $100,000.

2. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent's district offices located in Cleveland, Ohio, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All debit agents employed at or working out of the Employer's Cleveland 1 and Cleveland 2 district offices located in Cleveland, Ohio, excluding office clerical employees, special agents, district managers, assistant district managers, superintendents, assistant superintendents, and professional employees, guards and all other supervisors as defined in the Act.

4. On or about April 21, 1964, a majority of the employees of the Respondent in the unit stated above, by a secret ballot election conducted under the supervision of the Regional Director, Eighth Region, National Labor Relations Board, in Case No. 8-RC-5456, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, and on or about April 28, 1964, said Regional Director certified the Union as the exclusive-bargaining representative of the employees in the said unit.

5. At all times since on or about April 28, 1964, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit stated above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. On or about May 11, 1964, the Union requested the Respondent to bargain collectively with it with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive collective-bargaining representative of all the employees of Respondent in the said unit.

7. Commencing on or about May 11, 1964, and at all times thereafter, Respondent did refuse, and continues to refuse, to recognize the Union as the exclusive collective-bargaining representative of all the employees in the said unit, notwithstanding the fact that the Union was at the time duly designated and certified as the exclusive bargaining representative of the Respondent's employees in said unit.

8. By refusing to recognize the Union as the exclusive collective-bargaining representative of the employees in the said unit on or about May 11, 1964, and thereafter, the Respondent has refused to bargain collectively with the Union in violation of Section 8(a)(5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, the undersigned Trial Examiner, pursuant to Section 10(c) of the Act, issues the following:

RECOMMENDED ORDER.

American Life and Accident Insurance Company of Kentucky, Cleveland, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Insurance Workers International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All debit agents employed at or working out of the Employer's Cleveland 1 and Cleveland 2 district offices located in Cleveland, Ohio, excluding office clerical employees, special agents, district managers, assistant district managers, superintendents, assistant superintendents, and professional employees, guards and all other supervisors as defined in the Act.

(b) Interfering with the efforts of the Insurance Workers International Union, AFL-CIO, to negotiate for

or represent the employees in the said appropriate unit as the exclusive bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Insurance Workers International Union, AFL-CIO, as the exclusive representative of the employees in the appropriate unit described in paragraph 1(a) above, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Cleveland 1 and Cleveland 2 district offices, copies of the notice attached hereto marked Appendix D.[1] Copies of said notice to be furnished by the Regional Director for the Eighth Region, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Eighth Region, in writing, within 20 days from the receipt of this

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[1] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER", shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

Recommended Order what steps it has taken to comply herewith.[2]

Dated at Washington, D. C.

OWSLEY VOSE,
Trial Examiner.

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[2] In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

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No. 347

In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY OF KENTUCKY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. 12–13) is reported at 394 F. 2d 616. The Board's decision and order (S.J.A. 127a–160a)[1] are reported at 158 NLRB 258.

JURISDICTION

The order of the court of appeals was entered on May 10, 1968 (Pet. 12). The petition for a writ of certiorari was filed on July 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." and "S.J.A." refer to the portions of the record printed in the Joint Appendix and Supplemental Joint Appendix to the briefs in the court below.

319-699—68

QUESTIONS PRESENTED

1. Whether the Board reasonably found that the Company's two district offices in Cleveland, Ohio, comprised an appropriate bargaining unit.

2. Whether the Board properly refused to allow relitigation in the unfair labor practice case of issues decided in a prior representation proceeding.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition.

STATEMENT

Petitioner sells and issues industrial life insurance policies in Kentucky, Ohio, and Indiana. In addition to the home office in Louisville, Kentucky, petitioner maintains eight district offices in Kentucky and seven in Ohio. There are single district offices in Cincinnati, Dayton, Columbus, Youngstown, and Akron, and two in Cleveland. (J.A. 45a–46a.)

On February 4, 1964, the Union [2] filed a representation petition seeking certification as the bargaining representative of the debit agents working out of petitioner's two district offices in Cleveland. Pursuant to Section 9(c)(1)(A) of the Act (29 U.S.C. 159(c)(1)(A)), a hearing was held on the petition, at which the following facts were presented in the testimony of petitioner's vice-president:

Each of petitioner's district offices is under the supervision of a district manager who reports directly

[2] Insurance Workers International Union, AFL–CIO.

to the vice-president (J.A. 45a–46a, 57a, 60a). Each district office is staffed by debit agents and superintendents, who periodically audit the debit agents' books (J.A. 54a, 84a–85a). The superintendents are responsible to the district managers, who must account for all premiums collected (J.A. 75a). Special agents are assigned by the home office to various district offices to assist debit agents in sales techniques (J.A. 57a–58a).[3]

The debit agents sell insurance and collect the premiums. Each agent services an assigned territory, known as a debit, and reports to the district office three times weekly to turn in collections (J.A. 67a, 80a).[4] Although there is no formal employment contract, all debit agents are subject to company-wide wage policies and employee benefits. New agents undergo a two-week indoctrination conducted by the district manager. The district managers discipline agents when necessary, and decide whether to order a final accounting of the debit, leading to termination of the agent's employment (J.A. 54a). While the vice-president makes the ultimate decision on separations, the decision of the district manager to order a final audit almost always leads to termination (J.A. 55a).

Agents are rarely transferred from one district to another, and there is ordinarily no business or social contact among the debit agents except at the district office level (J.A. 70a, 80a). District managers have

[3] The special agents were excluded from the bargaining unit by stipulation of the parties.

[4] Industrial life insurance premiums are payable weekly (J.A. 65a–66a).

supervisory responsibility only for the personnel of their respective district offices (J.A. 70a).

Finding that each district office was a self-contained operating unit, that there was substantial distance between the district offices, that there was separate, immediate supervision in each district office, and that transfers or interchange among offices was limited, the Regional Director concluded that each district office was a separate administrative entity which would constitute an appropriate bargaining unit (J.A. 19a). The Regional Director further found that the grouping of the debit agents of the two Cleveland district offices in a single unit was justified by "cogent geographic considerations" (*ibid.*).[5] Accordingly, and in view of the absence of any history of collective bargaining and the fact that no union sought to represent a broader unit, he directed that an election be conducted among the debit agents in a unit consisting of the Company's two district offices in Cleveland (J.A. 18a-19a).[6] The Union won the ensuing election and was certified as the bargaining representative in that unit (S.J.A. 129a).

Petitioner refused to bargain with the Union, and an unfair labor practice complaint issued. The Trial Examiner granted the General Counsel's motion for judgment on the pleadings, on the grounds that there were no factual issues, since petitioner admitted the

[5] The closest district office to Cleveland is in Akron, some 30 miles away.

[6] The Company submitted a Request for Review to the Board, which was denied on the ground that it raised no substantial issue (S.J.A. 129a).

refusal to bargain in its answer, and that petitioner intended to offer no evidence that had not previously been evaluated in the representation proceeding (S.J.A. 137a).[7] The Board affirmed, and ordered petitioner to bargain with the Union on request and to post appropriate notices (S.J.A. 140a-141a).

The court of appeals enforced the order, holding that the Board had adequately articulated the bases for its ruling that the two Cleveland district offices constituted an appropriate unit, and that it had not given controlling weight to the extent of union organization or otherwise abused its discretion. The court also held that petitioner's claim that it was denied due process was without substance (Pet. 12–13).

ARGUMENT

1. Section 9(b) of the Act empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In view of this broad authority and the expertise involved in such determinations, the finding that a unit is appropriate is not to be set aside unless the Board has acted arbitrarily (*Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491–492), or has failed

[7] In its answer to the Examiner's second show cause order, petitioner asserted that it intended to litigate the issue (raised in its prior request for review of the election order (J.A. 35a–36a)) that the Regional Director was "biased and prejudiced" in that he allegedly did not read petitioner's brief prior to issuing his decision (J.A. 9a). In addition, petitioner asserted the need to develop in further detail its position that the certified unit was not appropriate (J.A. 10aa).

clearly to articulate the basis for its determination (*National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442–443). The court below correctly held that there was no warrant for disturbing the Board's unit determination here.

The record fully supports the finding that each district office is "a separate administrative entity through which the Employer conducts its business operations" (J.A. 19a). While a single district office would constitute an appropriate unit,[8] a unit of two or more district offices may also be appropriate where there is, as in this case, a reasonable degree of geographic coherence among such offices.[9] Petitioner's Cleveland offices are geographically separate, not only from the Louisville home office, but from petitioner's nearest other district office, which is approximately 30 miles away in Akron.

Since there were cogent reasons for the Board's unit determination, apart from the extent of union organization, there was no violation of Section 9(c)(5) of the Act. The Court made clear in *Metropolitan Life Ins. Co., supra*, 380 U.S. at 441–442, that the extent of

[8] See *National Labor Relations Board* v. *Western and Southern Life Ins. Co.*, 391 F. 2d 119 (C.A. 3); *Corrie Corp. of Charleston* v. *National Labor Relations Board*, 375 F. 2d 149, 154–155 (C.A. 4); *National Labor Relations Board* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (C.A. 4); *Metropolitan Life Ins. Co. (Woonsocket, R.I.)*, 156 NLRB 1408.

[9] See, *e.g.*, *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 202 (C.A. 6), certiorari denied, 328 U.S. 866 (unit of three mines in one locality, excluding a fourth mine 37 miles away); *Texas Pipe Line Co.* v. *National Labor Relations Board*, 296 F. 2d 208, 213 (C.A. 5) (unit of three of the employer's seven operating divisions).

union organization may be considered by the Board, as long as it is not the controlling factor in its unit determination.

2. The court below properly rejected petitioner's contention that it was denied procedural due process by the Board's refusal to permit it to relitigate the unit determination in the unfair labor practice proceeding. The only basis for seeking relitigation was the claim that the Regional Director was biased, based entirely on an unsupported allegation that he had failed to consider petitioner's brief. Since the Board had previously rejected that contention in denying petitioner's request to review the direction of an election (nn. 6, 7, *supra*), the Board was fully justified in foreclosing relitigation of the unit determination. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 157–158; *National Labor Relations Board* v. *Air Control Products,* 335 F. 2d 245, 249 (C.A. 5); *National Labor Relations Board* v. *Hollywood Brands, Inc.* (C.A. 7), 68 LRRM 2878, 2880, and cases cited therein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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